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Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

Criminal Appeal No. 412 of 2006.

Appellant:

Bablu alias Uday,
Son of Shri Bhujbal Yadav,
Aged 24 years,
Occupation-Labour,
Resident of C.S.E.B. Colony,
Darri, Thana-Darri,
District-KORBA (C.G.)

(IN JAIL)

2324/06

Filed on 27.5.06
by Shri P. Sahu Advocate
27/5/06
R. to D.R. (J)

VERSUS

Respondent:

State of Chhattisgarh,
Through the District Magistrate,
District-KORBA (C.G.)

CRIMINAL APPEAL UNDER SECTION 374 OF THE CODE OF CRIMINAL PROCEDURE, 1973.

A.F.R. (32)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.412/2006

Bablu @ Uday

Vs.

State of Chhattisgarh

Post for Order : 27 .07.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge
27 .07.2006

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Before: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Criminal Appeal No. 412/2006

Bablu @ Uday

Vs.

State of Chhattisgarh

Shri Awadh Tripathi, learned counsel for the petitioner.

Shri M.P.S.Bhatia, learned Panel Lawyer for the State.

JUDGMENT

(Delivered on this 27th day of July 2006)

Shri C.L.Patel, Special Judge (Atrocities), Korba has in Special Sessions Case No.08/2005 convicted the appellant-Bablu @ Uday under Sections 363, 366 and 376 (1) of the I.P.C. and also under Section 3 (1) (xii) of the Scheduled Caste Scheduled Tribe (Prevention of Atrocities) Act, 1989 (herein after referred to as the Act). The appellant was sentenced to rigorous imprisonment for three years and a fine of Rs.500/- and in default of fine to undergo additional rigorous imprisonment for three months under Section 363 I.P.C., to rigorous imprisonment for five years and a fine of Rs.1000/- and in default to undergo additional rigorous imprisonment for six months under Section 366 I.P.C., to rigorous imprisonment for ten years and a fine of Rs.2000/- and in default to undergo additional rigorous imprisonment for one year under Section 376(1) I.P.C. and to rigorous imprisonment for five years and a fine of Rs.1000/- and in default to undergo additional rigorous imprisonment for six months under Section 3 (1) (xii) of the Act. Hence, this appeal.

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2. Briefly stated the prosecution story is that on 27.11.2004 at about 6.00 A.M. the prosecutrix P.W.2, aged about 17 years, left her house in Yamuna Vihar, N.T.P.C. Jamnipali for going to the school. However, after attending school till 9.30 A.M. she left the school. Her school bag was taken by her classmate to teacher Smt. Mary Tigga P.W.4 at 11.30 A.M. who informed S. Toppo P.W.1, father of the prosecutrix that his daughter had left the school. Upon this, after searching in vain for his daughter, S.Toppo P.W.1 lodged a missing person report at 11.00 P.M. on 27.11.2004 at P.S. Darri vide Ex.P.11(C). A few days thereafter, on 2.12.2004 the prosecutrix called her residence by telephone from the S.T.D. booth of Munnavar Sheikh P.W.5. B. Toppo P.W.3, uncle of the prosecutrix, attended the call and asked the prosecutrix about her whereabouts. The prosecutrix told him that she was at Patna in Bihar. On being asked to return home or to give her address, the prosecutrix told him that she would return herself. Since the telephone at the residence of the prosecutrix at Bilaspur had a caller I.D., B. Toppo called the number and learnt that the call was made from S.T.D. P.C.O. Center at Bilaspur. Earlier while the prosecutrix was making the call, Munnavar Sheikh P.W.5 heard the prosecutrix saying that she was calling from Bihar which aroused his suspicion. He saw that a girl was sitting with a boy inside the S.T.D. P.C.O. and asked Birbal Chouhan to follow the girl and to find out where she went. Birbal Chouhan P.W.6 followed the appellant and the prosecutrix and saw them entering a house in village Lawar and returned to the S.T.D.P.C.O. and informed Munnavar Sheikh P.W.5 accordingly.

3. In the meanwhile, B.Toppo P.W.3 informed the Police on telephone which contacted the S.T.D.P.C.O. Munnavar Sheikh informed the Police that the boy and girl were in village Lawar. On the same night i.e. 2.12.2004, the prosecutrix and the appellant were found by the Police in the house of one co-accused Bhagirathi who has been acquitted. Upon a written complaint made by S. Toppo vide Ex.P.1, *Dehati Nalishi* Ex.P.1(A) was lodged on 2.12.2004 at 6.00 P.M. On 2.12.2004 at 11.00 P.M., the

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prosecutrix was recovered from the house of Bhagirathi where she was present in company of the appellant. Panchnama Ex.P.8 was prepared. F.I.R. was registered at Police Station Darri vide P.1(B) on 3.12.2004.

4. Caste Certificate Ex.P.4 (A) showing that the prosecutrix belonged to a Scheduled Tribe was seized. Her mark ~~list~~ sheet Ex.P.4 (B) and photocopy of her Birth Certificate showing her date of birth as 8.10.1987, were also seized. The prosecutrix was sent for medical examination. Dr. S. Shrivastava P.W.13 examined the prosecutrix on 4.12.2004 at 2.00 P.M. and found that she had 14 teeth in each jaw. No mark of any external injury was found on her body. On internal examination, it was found that the prosecutrix was menstruating which had commenced from 29.11.2004. Her hymen was intact. No injury was seen on vagina which admitted one finger. Menstrual bleeding was present. Two vaginal slides were prepared and sealed. One white Salwar having multiple reddish brown stains and one cotton navy blue coloured underwear with multiple brownish and white stains, belonging to the prosecutrix were sealed and were handed over to the Constable for chemical analysis. In the opinion of Dr. S. Shrivastava P.W.13, since the hymen of the prosecutrix was intact and no injury or tear was found in the vagina, sexual intercourse had not been performed i.e. complete penetration had not taken place. For confirmation of the age of the prosecutrix, she advised X-ray though in her opinion, clinically the age of the prosecutrix appears to be between 16 and 17 years. It was stated that final opinion as to age could be given by the Radiologist after the test of ossification was done.

5. The appellant was also examined by Dr. R.K.Divya P.W.12 on 3.12.2004 who found that he was capable of performing sexual intercourse. There were no semen like stains on his underwear which was sealed and handed over to the Police Constable along with a smear of the glans penis and a hair. The prosecutrix in her statement under Section 161 Cr.P.C. to the police did not state that the appellant had, at any point of time

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committed sexual intercourse with her. This statement Ex.D.1was recorded by Assistant Sub-Inspector K.P.Jaiswal P.W.16. After completion of Investigation, a challan under Sections 363, 366, 376 (1) IPC and under Section 3 (1) (xii) of the Act was presented. Upon committal of the case by the Judicial Magistrate First Class, Katghora, Shri R.S.Sharma, the then learned Sessions Judge, Korba, without there being even an iota of material on record to show that the appellant had, at any point of time after the alleged kidnapping on 27.11.2004, committed rape on the prosecutrix, framed a charge under Section 363, 366 and 376 (1) I.P.C. and also under Section 3 (1)(xii) of the Act against the appellant

6. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 16 witnesses. Relying upon the evidence led by the prosecution, Shri C.L. Patel, learned trial Judge convicted and sentenced the appellant as aforesaid in paragraph-1.

7. Shri Awadh Tripathi, learned counsel for the appellant has contended that the testimony of the prosecutrix that the appellant had committed sexual intercourse twice on her at village Laata and lastly at Bilaspur was clearly negatived by medical evidence of Dr. S. Shrivastava in paragraph 4.1 and paragraph 5 as also by the omission in her statement under Section 161 Cr.P.C. Ex.D.1 wherein she not only did not state about any sexual intercourse with her by the appellant but had categorically stated that the appellant had not done any *"Galat Kàam"* with her. It was also contended that despite the fact that Dr. S.Shrivastava had advised Radiological examination of the prosecutrix for confirmation of her age, yet no Radiological examination of the prosecutrix was got conducted by the prosecutrix. It was also contended that the birth certificate Ex.P. 4(C) was stated to have been seized from S. Toppo P.W.1 vide Ex.P.4 whereas seizure memo Ex.P.4 did not show that any such birth certificate had been seized. It was also pointed out that in the birth certificate the registration of

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date of birth of the prosecutrix i.e. 8.10.1987 was done on 11.4.1989 and there was nothing on record to show the basis upon which the date of birth was recorded as 8.10.1987. The birth certificate was merely a photocopy and was not duly proved. Since the primary evidence relating to proof of date of birth of the prosecutrix was withheld by the prosecution, the possibility that the prosecutrix was aged 18 years or more on the date of occurrence could not be ruled out.

8. It was also contended that the conduct of the prosecutrix in calling her home at Bilaspur on telephone and stating, upon being asked by her uncle B.Toppo P.W.3 to give her whereabouts, that she was at Patna in Bihar and would herself return home goes to show that the prosecutrix had accompanied the appellant voluntarily without there being any coercion, inducement or threat. Paragraph 3 of the testimony of the prosecutrix was also referred to wherein the prosecutrix had stated that for two days after returning home she did not tell even her mother about any rape having been committed by the appellant on her. It was urged that the testimony of the prosecutrix was wholly unworthy of any credit and the conviction of the appellant for offence under Section 376 IPC and under Section 3(1)(xii) of the Act was liable to be set aside.

9. It was further urged that the manner in which the prosecutrix, a grown-up girl apparently above 17 years of age had accompanied the appellant to village Laata in Katghora and from there to Bilaspur coupled with the manner in which she spoke to her uncle B.Toppo P.W.3 on telephone clearly ruled out the possibility that the prosecutrix was kidnapped or abducted with intent to subject her to sexual intercourse by the appellant. It was also argued that an adverse inference ought to have been drawn against the prosecution for non-examination of the mother of the prosecutrix. Lastly, it was urged that the testimony of Dr. S. Shrivastava clearly revealed that the prosecutrix was a fully grown-up woman. Her vagina was intact with no injury on the vaginal orifice. The

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opinion given by Dr. S. Shrivastava in her testimony that no rape had been committed on the prosecutrix clearly negatived the testimony of the prosecutrix and rendered her unworthy of credit. On these premises, it was urged that the conviction and sentence were liable to be set aside.

10. On the other hand, Shri M.P.S. Bhatia, learned Panel Lawyer argued in support of the impugned judgment and stated that the testimony of the prosecutrix that she was raped twice by the appellant was wholly unrebutted in cross-examination and was therefore worthy of credence. It was also urged that the omission in her case diary statement Ex.D.1 had not been proved by the defence by examining Assistant Sub-Inspector K.P.Jaiswal P.W.16 and by cross-examining Assistant Sub-Inspector K.P.Jaiswal P.W.16 on that point. The report of the Forensic Science Laboratory Ex.P.14 that presence of semen and human spermatozoa was confirmed on the underwear, salwar and vaginal slides of the prosecutrix as also on the underwear and smear of the glans penis of the appellant corroborated the testimony of the prosecutrix. Therefore, on these grounds, it was urged that conviction and sentence awarded by the learned trial Judge were well founded and called for no interference.

11. Having heard the rival contentions, I have perused the record. It is not disputed by the learned counsel for the appellant that the prosecutrix belonged to the Scheduled Tribe category. It is also not disputed that even after the prosecutrix was recovered from the house of Bhagirathi on 2.12.2004, a report of rape having been committed on her by the appellant was not lodged by the prosecutrix. After completion of investigation, the appellant was not prosecuted under Section 376 IPC but was prosecuted only under Section 363 & 366 IPC and under Section 3 (1) (xii) of the Act. The prosecutrix P.W.2 has stated that she accompanied the appellant while she was on her way to the School, she felt unwell upon which the appellant offered to take her home but instead took her to his friend's house at village Laata in tehsil Katghora where they stayed for the night. Nowhere did she

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state that she raised any alarm while instead of being taken to her home she was being taken to village Laata by the appellant. She did not state that she complained to the friend of the appellant or any person residing in the neighbourhood about having been kidnapped by the appellant. According to her in village Laata, the appellant forcibly attempted to commit rape on her. Thereafter, she stated that on the next day, the appellant took him on a motor cycle to Bilaspur. Again there is nothing in her evidence to show that she raised any alarm or tried to run away or to inform anybody. At Bilaspur, the appellant took her to the house of his friend Bhagirathi where the appellant threatened to beat her and to keep quiet. She stated that here also the appellant attempted to forcibly commit rape on her twice. It is not disputed that the prosecutrix was recovered with the appellant from the house of Bhagirathi at village Lawar on 2.12.2004 i.e. on the 6th day after the prosecutrix had left with the appellant. During this long period of five days, there is nothing to show that the prosecutrix had in any manner resisted or had raised any alarm or informed or complained to any neighbour about the act of the appellant. She admitted in para 8 that Bhagirathi had in no manner ill-treated, threatened or abused her.

12. In paragraph 3 of her testimony, the prosecutrix admitted that on reaching home finally on 2.12.2004 she did not narrate the incident of rape to her mother but had told her about it after two days. Had this been true, the prosecutrix or atleast her father S.Toppo would have lodged a report with the Police about rape having been committed on his daughter. Had this been true the prosecutrix would have in her statement under Section 161 Cr.P.C. to the police stated about rape having been committed on her.

13. S. Toppo P.W.1 in paragraph 14 has admitted that the prosecutrix did not tell him about any rape having committed by the appellant on her. The testimony of B.Toppo P.W.3, uncle of the prosecutrix also shows that the prosecutrix had called him on telephone from Bilaspur and had pretended that she was calling from Patna in Bihar and on being asked by

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him to give her whereabouts, had stated that she would return home herself. This conduct of the prosecutrix clearly goes to show that the prosecutrix had voluntarily and of her own free will accompanied the appellant on 27.11.2004 and had visited village Laata near Katghora and thereafter stayed with the appellant at the house of Bhagirathi at Lawar till 2.12.2004. The testimony of Munnavar Sheikh P.W.5 also clearly shows that at his S.T.D.P.C.O. center he heard the girl saying that she was calling from Bihar which aroused suspicion. His testimony does not, in any manner, show that the prosecutrix was under any kind of fear, threat or coercion since the prosecutrix accompanied the appellant after making the aforesaid call to her uncle. The testimony of Birbal Chouhan P.W.6 also does not show in any manner that the prosecutrix had at any point of time, whether at the S.T.D.P.C.O. or while returning home had raised any alarm. It shows that the prosecutrix had voluntarily accompanied the appellant to the house of Bhagirathi.

14. Smt. Mary Tigga P.W.4, teacher at the school where the prosecutrix studied, stated that the friend of the prosecutrix had brought her school bag to her at about 11.30 A.M. which shows that the prosecutrix had gone to the school and leaving her school bag there, had of her own free will left with the appellant. She had accompanied the Police to the house of Bhagirathi at village Lawar from where the prosecutrix was found. In paragraph 4 of her testimony, Mary Tigga has clearly stated that on being asked, the prosecutrix had stated that she had left her bag at the school and had gone with the appellant-Uday. This is also indicative of the free will and consent of the prosecutrix in eloping with the appellant.

15. Medical evidence of Dr. S. Shrivastava P.W.13 clearly shows that on 4.12.2004 she did not find any external injury on the person of the prosecutrix. Her vagina was intact. There was no injury mark on the vaginal orifice which admitted only one finger. The prosecutrix was menstruating since 20.11.2004. In paragraph 5 she has clearly opined that

since hymen was intact, sexual intercourse had not been committed with the prosecutrix since the penis could not be penetrated wholly inside the vagina. Merely because she has stated that a partial penetration of the penis inside the vagina was possible, no such inference can be drawn in favour of the prosecution. So far as the report of the F.S.L. Ex.P.14 is concerned, the prosecutrix was found at the house of Bhagirathi on 2.12.2004 and was medically examined after two days i.e. 4.12.2004 by Dr. S. Shrivastava and the appellant was examined on 3.12.2004 by Dr. R.K. Divya P.W.12. The presence of semen and human spermatozoa on the underwear, salwar and vaginal slides of the prosecutrix can not be attributed to the appellant because the report of the F.S.L. clearly shows that the stains were not sufficient for Serological examination. The testimony of Dr. R.K.Dviya P.W.12 that there were no semen like stains on the underwear of the appellant also renders the report of the F.S.L. doubtful. In view of the evidence of the prosecutrix and the facts and circumstances mentioned above, the report of F.S.L. Ex.P.14 does not conclusively establish that the appellant had committed rape on the prosecutrix.

16. The testimony of the prosecutrix is rendered wholly unworthy of any credit since her statement Ex.D.1 recorded under Section 161 Cr.P.C. clearly goes to show that she had narrated to the Investigating Officer that no sexual intercourse *"Galat Kaam"* had been committed by the appellant on her. She was contradicted with portion 'A to A' in her statement under Section 161 Cr.P.C. where she had clearly stated that the appellant had not committed any *"Galat Kaam"* with her. The material omission in her case-diary statement regarding rape having been committed upon her by the appellant on more than one occasion was thus proved in view of the fact that the case-diary statement Ex.D.1 was a document filed by the prosecution and exhibited during testimony of the prosecutrix. Assistant Sub-Inspector K.P.Jaiswal P.W.16 also testified that he had recorded the case-diary statement of the prosecutrix as stated by her. In this view of the matter, the material omission in the statement under Section 161 Cr.P.C. of

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the prosecutrix regarding rape having been committed upon her by the appellant completely renders her testimony unworthy of any credit.

17. It is also pertinent to note that the prosecution did not either cite or examine the mother of the prosecutrix as a witness to whom the prosecutrix is alleged to have narrated about rape having been committed upon her by the appellant. Adverse inference is drawn against the prosecution on this count. Birth Certificate Ex.P.4(C) which was not seized during investigation vide Ex.P.4. Ex.P.4 is the memo of seizure of only the mark-list of the prosecutrix which is Ex. P.4(B). Thus Ex.P.4(C) which is only an unattested photocopy becomes a highly suspicious document. It does not show the basis on which the date of birth of the prosecutrix was registered as 8.10.1987 on 11.4.1989. Dr. S. Shrivastava P.W.13 has in paragraph 6 of her testimony, clearly stated that she advised X-ray of the prosecutrix for determination of her age. However, despite such medical advice, Radiological examination of the prosecutrix was not conducted for which adverse inference needs to be drawn against the prosecution. Primary evidence relating to proof of date of birth of the prosecutrix has not been adduced by the prosecution. Original birth certificate of the prosecutrix has also not been filed and exhibited. The testimony of Dr. S. Shrivastava P.W.13 clearly goes to show that 14 teeth were present on each jaw of the prosecutrix and the prosecutrix was already menstruating. Secondary sexual characters were also developed. In the absence of primary evidence relating to proof of date of birth and the test of ossification, the possibility that the age of the prosecutrix on the date of occurrence was 18 years or more could not be ruled out.

17. The following facts thus emerge from the above discussion:

A) The prosecutrix left the school on 27.11.2004 voluntarily with the appellant.

B) The prosecutrix voluntarily accompanied the appellant to

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village Laata at Katghora and stayed there for the night and thereafter accompanied the appellant on a motorcycle to Bilaspur and stayed there at the house of Bhagirathi till 2.12.2004.

C) The testimony of the prosecutrix that the appellant committed rape on her during that period is wholly rendered unworthy of any credit. The fact that she was menstruating since 29.11.2004 also falsifies her version of rape.

D) Medical evidence of Dr. S. Shrivastava also rules out any possibility that rape was committed by the appellant on the prosecutrix.

E) The prosecutrix or her parents did not lodge any report of rape against the appellant after the prosecutrix was recovered by the Police from the house of Bhagirathi on 2.12.2004.

F) Merely on the basis of the report of the Forensic Science Laboratory the guilt of the appellant under Section 376 (1) of the I.P.C. was not conclusively established.

G) The evidence led by the prosecution and the conduct of the prosecutrix clearly shows that she had eloped with the appellant on her own free-will without there being any inducement, coercion or threat and stayed with the appellant at village Laata during the night and at Bilaspur for three to four days.

H) The possibility that the prosecutrix was a girl aged 18 years or more on the date of occurrence could not be ruled out since document Ex.P.4(C) aroused suspicion, primary evidence of proof of date of birth was not produced by the prosecution and ossification test though medically advised, was not conducted during investigation.

18. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the prosecution has utterly failed to establish the guilt of the appellant under Sections 363, 366 and 376(1) IPC and under Section 3(1)(xii) of the Act, 1989. Conviction of the appellant for the aforesaid offences and the sentences awarded thereunder by the learned trial Judge deserve to be set aside.

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19. In the result the appeal is allowed. Conviction of the appellant under Sections 363, 366 & 376(1) IPC and under Section 3(1)(xii) of the Act and the sentence awarded thereunder by the learned trial Judge are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded.

Sd/-
Dilip Raosaheb Deshmukh
Judge